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No. 94-_____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

LYLE R. GOETZ, MARK CANS and ANNA SELLETTI, on behalf of themselves and all others similarly situated,

Petitioners,

-against-

The Honorable MATTHEW CROSSON, in his official capacity of chief administrator of the courts of New York, and DR. RICHARD C. SURLES, in his official capacity of Commissioner of the New York State Office of Mental Health,

Respondents.

PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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12 pp

QUESTIONS PRESENTED

1. Does the Fourteenth Amendment require the State of New York to provide indigent mental patients, who challenge their confinement, with a psychiatrist who is available to (1) testify promptly on their behalf if the expert's clinical determinations are favorable to the patient and (2) assist in the preparation and presentation of the patient's case?

2. Whether a delay of six weeks from the time of a request for a hearing until the provision of a constitutionally adequate hearing violates the Due Process Clause of the Fourteenth Amendment?

LIST OF PARTIES

The caption of the case contains the names of all the parties.

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Appelbaum, *In Wake of Ake: The Ethics of Expert Testimony in an Advocate's World*, 15 Bull. Am. Acad. Psychiatry & Law 15 (1987) 18

Center for Mental Health Services, *Mental Health, United States 1994*, (1994) 10

Developments in the Law-Civil Commitment of the Mentally Ill, 87 Harv. L. Rev. 1190(1974) 21-22

Farrell, *The Right of an Indigent Civil Commitment Defendant to Psychiatric Assistance of His Own Choice at State Expense*, 11 Idaho L. Rev. 141 (1975) 17

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Hiday, *Reformed Commitment Procedures: An Empirical Study in the Courtroom*, 11 Law & Society Review 651 (1977) 12

Legal Issues in State Mental Health Care: Proposals for Change-Civil Commitment, 2 Ment. & Phys. Dis. L. Rep. 75 (1977) 17

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Stromberg & Stone, *A Model State Law on Civil Commitment of the Mentally Ill*, 20 Harv. J. Legis. 275 (1983) 22-23

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PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Lyle Goetz, Mark Cans and Anna Selletti respectfully request that a writ of *certiorari* issue to review the judgments and opinions entered in this case by the United States Court of Appeals for the Second Circuit on November 28, 1994 and June 10, 1992.

OPINIONS BELOW

The November 28, 1994 opinion of the United States Court of Appeals for the Second Circuit is reported at 41 F. 3d 800 (2d Cir. 1994). It is set forth in the Appendix to this Petition at 1a-11a.

The June 10, 1992 opinion of the Second Circuit is reported at 967 F. 2d 29 (2d Cir. 1992) and is set forth in the Appendix to this Petition at 12a-36a.

The opinion of the United States District Court, dated November 23, 1993, that granted summary judgment to the defendants after remand from the Second Circuit is reported at 838 F. Supp. 136 (S.D.N.Y. 1993) and set forth in the Appendix to this Petition at 37a-48a.

The opinion of the United States District Court, dated July 30, 1991, that initially granted summary judgment to the defendants is reported at 769 F. Supp. 132 (S.D.N.Y. 1991) and set forth in the Appendix to this Petition at 49a-59a.

The opinion for the United States District Court for the Southern District of New York, dated January 12, 1990, that certified this lawsuit as a class action is reported at 728 F. Supp. 995 (S.D.N.Y. 1990) and set forth in the Appendix to this Petition at 60a-79a.

JURISDICTION

The United States Court of Appeals for the Second Circuit entered an opinion and judgment in this case on November 28, 1994. The petitioners filed a petition for rehearing containing a suggestion that the action be reheard en banc. On February 2, 1995, the Court of Appeals denied the petitioners' motion. The order denying the motion is set forth in the Appendix at 77a of the Appendix. This petition for a writ of *certiorari* is taken from the November 28, 1994 and June 10, 1992 opinions and judgments of the United States Court of Appeals for the Second Circuit pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves an interpretation of the Fourteenth Amendment to the United States Constitution. This lawsuit also involves New York Judiciary Law § 35(4) (McKinney 1983 and Supp. 1995) and New York Mental Hygiene Law § 9.31 (McKinney 1988 and Supp. 1995). The relevant texts of these provisions are set forth at 80a-81a of the Appendix.

STATEMENT OF THE CASE

This case involves two of the most basic elements of due process that arise when the State deprives someone of

his liberty by locking him in a mental hospital: (1) the right to meaningfully challenge one's confinement through the provision of psychiatric assistance; and (2) the right to do so in a timely fashion. This lawsuit is a class action in which the class representatives are individuals who have been involuntarily hospitalized in Dutchess County, New York. They assert that the Fourteenth Amendment confers upon indigent mental patients the right to the appointment of a psychiatrist who is available to (a) testify promptly on the individual's behalf if the court-appointed expert's clinical determinations are favorable to the patient and he wishes to use such testimony, and (b) otherwise assist in the preparation and presentation of the patient's case.

Presently in New York, New York Judiciary Law § 35 governs the appointment of psychiatric experts in retention, *i.e.*, civil commitment, proceedings. The statute authorizes a court to appoint up to two psychiatric experts if a court so chooses. However, the statute sets forth a fee schedule of no more than two hundred dollars per appointment if the court appoints one expert, and three hundred dollars if the court appoints two psychiatrists.

The class representatives assert that the present appointment practice in Dutchess County violates the Due Process Clause in a number of ways. First, appointment is soley within the court's discretion. Second, because the statute authorizes the appointment of an expert witness whose only function is to provide information to the court and testify for either party in the retention proceeding, the court appointed expert fails to provide assistance to the patient in the preparation and presentation of his case. Finally, the provision of expert assistance in Dutchess County violates procedural due process because the appointment process results in a four to six-week delay in

the patient's commitment hearing. Such a delay results from the inability to attract doctors willing to accept court appointments because of the low fee schedule. This delay violates the State's obligation to provide a constitutionally adequate hearing in a timely fashion. This delay also effectively requires a patient to choose between a timely commitment hearing and the opportunity to pursue favorable psychiatric testimony.

Proceedings Below

In December 1988, pursuant to 28 U.S.C. §§ 1331 and 1343(3), petitioner Lyle Goetz, an indigent involuntarily hospitalized patient, filed this lawsuit in the United States District Court, Southern District of New York, on behalf of himself and other involuntarily hospitalized patients in Dutchess County. He sought a declaration that the State's failure to appoint, as of right, a psychiatrist who would provide favorable testimony if the patient's condition warranted such testimony, and otherwise assist in the preparation and presentation of the patient's case, violated the Due Process Clause of the Fourteenth Amendment and 42 U.S.C. § 1983.[1] While the defendants' motion to dismiss was pending,[2] petitioners Mark Cans and Anna Selletti

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1 Lyle Goetz asserted further that a practice at the hospital to which he was confined in which a non-treating psychiatrist examined patients for the sole purpose of gathering information, which he could use at the patient's commitment proceeding, violated the patient's privilege against self-incrimination. This issue is not before this Court.

2 Mr. Goetz had named as defendants in their official capacities the Chief Administrative Judge of New York State, the Commissioner of the New York State Office of Mental Health, and two local state court judges who presided over retention proceedings in Dutchess County. Subsequently, upon consent, the two local state court judges

moved to intervene and serve as class representatives, raising claims identical to those presented by Mr. Goetz.

The district court (Goettel, J.) denied the defendants' motion to dismiss, granted the motion by Mr. Cans and Ms. Selletti to intervene, and certified this lawsuit as a class action. The class consisted of individuals civilly committed within Dutchess County who will request retention hearings to challenge their confinement and will further request the assistance of an independent psychiatrist. 728 F. Supp. at 1003. In denying the motion to dismiss, the district court held that once the Office of Mental Health ("OMH") sought to retain the plaintiff past the terms of his present commitment, and the plaintiff expressed an intention to seek the appointment of an independent psychiatrist, a ripe controversy existed. 728 F. Supp. at 999.[3]

Subsequently, the district court granted summary judgment to the defendants. The court rejected the plaintiff and intervenors' ("plaintiffs") contention that commitment proceedings are quasi-criminal, as the goals of such proceedings are the care and treatment of the individual. 769 F. Supp. at 135. The court then concluded that the appointment of psychiatric experts as of right would create difficulties in attracting an adequate number of psychiatrists. 769 F. Supp. at 136. In addition, requiring a psychiatrist who believed a patient required in-patient treatment to assist the individual in obtaining his release would create ethical problems for the medical expert. *Id.* Finally, the court

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were removed as defendants.

3 The district court granted the portion of the defendants' motion to dismiss addressing the privilege against self-incrimination claim, holding that because retention proceedings are civil in nature, the privilege did not attach. 728 F. Supp. at 1002.

found that the numerous avenues of review for psychiatric patients under state law lessened the risk of an erroneous deprivation in the absence of the appointment of a psychiatric expert. 769 F. Supp. at 137. Consequently, the district court held that due process does not require the provision of expert psychiatric assistance in commitment proceedings. *Id.*

The Second Circuit reversed in part the decision of the district court. The court first held that except in a limited number of fact specific instances, the Due Process Clause does not require the provision of a psychiatric expert who would provide favorable testimony if the patient's condition warranted and otherwise assist in the preparation and presentation of the patient's case. The court referred to this type of expert as a consulting psychiatrist.

In reaching this decision, the court applied the three-prong criteria set forth *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976): (i) the interest of the individual subject to involuntary commitment; (ii) the governmental interest affected by the provision of expert assistance; and (iii) the risk of an erroneous deprivation of the individual's interests in the absence of the additional procedural safeguard and the probable value of the additional safeguard. 967 F. 2d at 33. In assessing these factors, the Second Circuit found that the roles of providing testimony if a patient's clinical condition warrants such testimony and assisting in the preparation and presentation of the patient's case "are not of sufficient import to implicate due process in every proceeding." 967 F. 2d at 34.

In so holding, the court first recognized that "psychiatrists often disagree about the proper diagnosis and treatment of particular patients" and lack the ability to predict a person's dangerousness with any great certainty.

967 F. 2d at 34. However, the court found that while a battle of the experts is often thought to increase the accuracy of a judicial proceeding in the adversary system, civil commitment proceedings are not entirely adversarial because the State provides care to those unable to care for themselves as a result of of mental disability. *Id.* Significantly, the Second Circuit concluded that the appointment of a psychiatric expert will not alter the number of erroneous adjudications. *Id.* at 35.

In assessing the importance of the psychiatric expert, the Second Circuit concluded that the consulting psychiatrist's role of providing favorable testimony of a patient's clinical condition overlaps with the role of a psychiatrist who is available to testify on behalf of either party. The court referred to this type of expert as an independent psychiatrist. The court then held that while due process may require the appointment of a consulting psychiatrist in a limited number of fact-specific cases, as a general rule, the Constitution does not require the appointment of an expert who will assist in the preparation of the patient's case since the patients' counsel can obtain a sufficient level of expertise to satisfy due process. *Id.* However, the Second Circuit determined further that when the State judge determines that independent psychiatric testimony is necessary for a reliable assessment of a patient, the individual's interests in freedom and self-protection implicate due process concerns and the individual should have the right to obtain an independent psychiatrist. 967 F.2d at 36, 37. The Second Circuit then remanded this case for the district court to determine whether the procedures in Dutchess County for appointing an independent psychiatrist satisfy due process.

Judge Newman concurred in the judgment in which he specifically addressed the following language in *Addington v. Texas*, 441 U.S. 418 (1979):

> It cannot be said, therefore, that it is much better for a mentally ill person to "go free" than for a mentally normal person to be committed.

967 F. 2d at 38 (*quoting* 441 U.S. at 429). Judge Newman emphasized that the statement should not be read to mean that committing a mentally normal person is no worse than releasing a mentally ill person. 967 F. 2d at 39. Because the consequences resulting from a wrongful confinement are worse than the consequences of an erroneous release, and, no matter how much care is exercised, many mentally ill individuals will remain undiagnosed and at liberty, it is better to add one more mentally ill person to the population at large than to institutionalize a non-mentally ill person. *Id.* Judge Newman then opined that the appointment of a consulting psychiatrist will enable the adversary system to function on a more informed basis, leaving it up to the State courts to rule on an individual's challenge to his involuntary hospitalization. 967 F. 2d at 40.

Judge Van Graafeiland dissented from the portion of the opinion that remanded the lawsuit to the district court. He rejected the notion that civil commitment proceedings are adversarial, stating that a patient's attorney must attempt to procure treatment for any client in need. 967 F. 2d at 37. Judge Van Graafeiland further opined that the federal courts are ill-equipped to address such issues as the amount of fees paid to experts in State court proceedings. As such, Judge Van Graafeiland would have either denied all relief without prejudice to the patients raising their claims in State court or abstained from resolution of the questions raised pending a

decision in State court of the issues raised in this lawsuit. 967 F. 2d at 38.

Upon remand, the district court again granted summary judgment to the defendants, rejecting the plaintiffs' assertion that delays of over one month violated due process. The court recognized that the limited number of psychiatrists in Dutchess County, the time it took to complete psychiatric evaluations and the inability to compel psychiatrists to complete their evaluations in a more timely fashion rendered it impracticable to compel the State to provide hearings more promptly when a court appointed an independent psychiatrist. 838 F. Supp. at 141. The court concluded that it lacked the authority to compel the State to raise the fees paid to expert witnesses as to induce them to conduct examinations more expeditiously. The court then held that because of a lack of effective remedial measures, it would not declare a situation unconstitutional. 838 F. Supp. at 141.

On appeal, the Second Circuit affirmed the judgment of the district court. Although the Second Circuit recognized that the State court system utilized only one psychiatrist for all its appointments, and the use of only one expert delayed proceedings four to six weeks, 41 F. 3d at 803, 804, it found that the delays did not violate due process because such confinement did not involve "a massive curtailment of liberty." 41 F. 3d at 804. The court then recognized that the delays resulting from the appointment of an independent psychiatrist are directly related to the limited number of psychiatrists in Dutchess County and the time constraints resulting from their other professional obligations. 41 F. 3d at 804. The court ruled that because the plaintiffs failed to establish that there were additional psychiatrists who were available to accept

assignment, and otherwise come forth with a practical remedy for the delays in Dutchess County, there was no due process violation. 41 F. 3d at 804-805.

REASONS FOR GRANTING THE WRIT

THE DECISIONS OF THE SECOND CIRCUIT SIGNIFICANTLY LIMITING THE PROVISION OF PSYCHIATRIC ASSISTANCE AT CIVIL COMMITMENT HEARINGS RAISE ISSUES OF FUNDAMENTAL IMPORTANCE AND ARE ARGUABLY AT ODDS WITH PRIOR DECISIONS OF THIS COURT.

This Court has recognized that "for the ordinary citizen, commitment to a mental hospital produces `a massive curtailment of liberty,'...[that]... `requires due process protection.'" *Vitek v. Jones*, 445 U.S. 480, 491-92 (1980) (*cites omitted*). To date, this Court has addressed the question of the appropriate burden of proof in civil commitment proceedings, *see Addington v. Texas*, 441 U.S. 418 (1979), and the applicability of the privilege against self-incrimination in sexual delinquency proceedings. *See Allen v. Illinois*, 478 U.S. 364 (1986). However, this Court has never delineated fully the scope of procedural protections that the State must afford involuntarily hospitalized patients as to enable them to challenge their confinement in a meaningful time and manner, *see Armstrong v. Manzo*, 380 U.S. 545, 552 (1965), and lessen the risk of an erroneous deprivation of liberty. *See Mathews v. Eldridge* 424 U.S. 319, 335 (1976). Specifically, this Court has never resolved the extent to, and the manner in which, the State must provide independent psychiatric assistance to individuals facing civil commitment.

In *Ake v. Oklahoma*, 470 U.S. 68 (1985), this Court held that, because of the pivotal role played by a psychiatric expert when a criminal defendant raises an issue of his sanity, due process requires the provision of psychiatric assistance when the defendant demonstrates that his sanity at the time of the offense will be a significant factor at trial. 470 U.S. at 83. This appeal presents this Court with an opportunity to resolve the question of the applicability of *Ake* to civil commitment hearings. This lawsuit also provides an appropriate opportunity for this Court to set forth a framework for due process analysis in the civil commitment context and examine the scope of procedural protections required by the Fourteenth Amendment. As such, it raises questions of fundamental importance to hundreds of thousands of individuals deemed mentally ill and dangerous whom State and local governments subject to involuntary hospitalization.[4]

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[4] The latest figures compiled by the federal government detail that in 1986 state and county psychiatric hospitals involuntarily hospitalized 211,566 individuals. In the last year for which statistics have been compiled, a total of 414,349 people were hospitalized in State and county hospitals, private psychiatric hospitals, multi-service facilities and psychiatric wards of general hospitals. Unpublished Data, Center for Mental Health Services, 1986 Client/Patient Sample Survey of Inpatient, Outpatient & Partial Care Programs. These figures are consistent with the latest published data from the federal government that details that in 1983, approximately 351,000 individuals were hospitalized at state and county mental hospitals, averaging 116 days per patient per year. Center for Mental Health Services, *Mental Health, United States, 1994* at 49 (1994). As far back as 1972, this Court noted that considering the number of individuals involuntarily hospitalized, it was "perhaps remarkable that the substantive constitutional limitations on this power have not been more frequently litigated." *Jackson v. Indiana*, 406 U.S. 715, 737 (1972).

The Critical Role Played by the Psychiatric Expert in Civil Commitment Proceedings Warrants a Determination of the Applicability of the Provision of Expert Assistance as of Right.

When the State brings its judicial power to bear on an indigent individual in a proceeding in which his liberty is at stake, due process requires that the individual be given a fair opportunity to present his defense. *Ake v. Oklahoma*, 470 U.S. at 76. This principle of meaningful participation has been extended beyond the criminal realm to "quasi-criminal" proceedings. *Id.* at 76.

Because of the medical nature of civil commitment hearings, meaningful participation requires utilization of psychiatric experts: "[w]hether the individual is mentally ill and dangerous to either himself or others and is in need of confined therapy turns on the *meaning* of facts which must be interpreted by expert psychiatrists and psychologists." *Addington v. Texas*, 441 U.S. at 429 (emphasis in original).[5]

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5 Numerous scholars have recognized the substantial correlation between expert opinions and judicial dispositions. *See* Morse, *Crazy Behavior, Morals and Science: An Analysis of Mental Health Law*, 51 So. Cal. L. Rev. 527, 536, n. 16 (1978) (concordance rate, *i.e.*, rate of correlation, between psychiatric opinions and ultimate legal disposition is "extraordinarily high"); Slobogin, *Dangerousness and Expertise*, 133 U. Pa. L. Rev. 97, 147, n. 182 (1984) (three studies find concordance rate between judicial disposition and psychiatric opinions to be 100% when a violent act was predicted, 100%, and 96%); Hiday, *Judicial Decisions in Civil Commitment: Facts, Attitudes and Psychiatric Recommendations*, 17 Law & Society Review 517, 526-527 (1983) (both underlying facts and psychiatric opinion "significantly influence" court decisions in civil commitment cases). One scholar has concluded that courts often defer to psychiatric opinion even when a preponderance of the evidence indicates that the opinion is unsubstantiated: informal conversations with judges and attorneys suggest that they defer to psychiatric opinion

However, psychiatry is not an exact science and psychiatrists disagree widely and frequently about what constitutes mental illness and the likelihood of future dangerousness. *Ake*, 470 U.S. at 81. Because of the medical nature of commitment hearings and the fallibility and uncertainty of psychiatric diagnoses, *see Addington v. Texas*, 441 U.S. at 429, a court appointed psychiatric expert serves numerous important functions.

First, the psychiatrist serves as an expert witness. Unlike a lay witness, the psychiatrist can identify the "`elusive and often deceptive' symptoms" of mental illness. *Ake*, 470 U.S. at 80 (*cites omitted*). The expert analyzes facts, draws appropriate conclusions, and presents information in a form that provides meaning for the factfinder. *Ake*, 470 U.S. at 80. The expert is also able to uncover and take into account the well-recognized "shortcomings" in the prediction of dangerousness. *Ake*, 470 U.S. at 84.

In addition to serving as a witness, the expert can assist the preparation of the cross-examination of the State's psychiatric witness. *Ake*, 470 U.S. at 82. Psychiatrists "know the probative questions to ask of the opposing party's psychiatrists and how to interpret their answers." 470 U.S. at 80. Accordingly, because of the dominant role of psychiatry in commitment hearings, just as when a mentally ill defendant raises the insanity defense, a civil committee's case "may be devastated by the absence of psychiatric testimony," while the provision of expert assistance dramatically enhances the potential accuracy of a

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because they feel they lack the requisite expertise and want to obtain help for those in need. Hiday, *Reformed Commitment Procedures: An Empirical Study in the Courtroom*, 11 Law & Society Review 651, 665 (1977).

factfinder's determination. *Ake*, 470 U.S. at 83. Indeed, because commitment hearings involve medical issues, "a person possessing . . . [psychiatric] qualifications normally would be preferred" to the assistance provided by an attorney. *Vitek v. Jones*, 445 U.S. at 500 (Powell, J. concurring); *see also Proctor v. Harris*, 413 F. 2d 383, 389 (D.C.Cir. 1969) (Bazelon, C.J. concurring) ("if an indigent patient needs and is entitled to a lawyer, far more may he also need the assistance of a psychiatrist in the presentation of his case"). Indeed, just as this Court recognized that utilization of lawyers in criminal proceedings indicated that they are "necessities, not luxuries," *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963), the same holds true for psychiatrists in the civil commitment context.

In reaching its initial decision, the Second Circuit ignored the critical roles played by psychiatric experts and rested its opinion upon premises that directly conflict with case law from this Court. First, the Second Circuit ignored this Court's determination in *Ake* that the provision of a psychiatric expert will enhance the accuracy of the factfinding process. *See* 470 U.S. at 83. Instead, the Court of Appeals concluded that "the testimony of consulting psychiatrists may not alter the number of erroneous adjudications," but would simply lessen the number of erroneous confinements while increasing the number of erroneous releases of mentally ill patients. 967 F. 2d at 35. The Court of Appeals also concluded that while the adversary system "tolerates and sometimes requires a `battle of the experts' because it is thought to increase the accuracy of a trial's outcome," 967 F.2d at 34, civil commitment proceedings are not entirely adverse because the State seeks to provide care to mentally ill individuals. 967 F.2d at 34-35. In so holding, the Court of Appeals ignored this Court's pronouncement that "[i]t is precisely `[t]he subtleties and

nuances of psychiatric diagnoses' that justify the requirement of adversary hearings." *Vitek v. Jones*, 445 U.S. at 496 (*citing Addington v. Texas*, 441 U. S. at 430).

The Court of Appeals also failed to recognize the crucial role psychiatrists can play in the preparation of an individual's case, particularly in the development of "probative questions to ask the opposing party's psychiatrists" and the interpretation of their answers. *Ake*, 470 U.S. at 80. Without citing any legal or other authority, the Court concluded that the patient's counsel will gain a sufficient level of expertise about psychiatric matters as to satisfy due process. 967 F. 2d at 35.

The Second Circuit's decision resulted from (1) the court's failure to reconcile two competing strains of case law from this Court and (2) the absence of case law from this Court that addresses the scope of procedural protections that are designed to enhance the reliability of the commitment process.[6] On one hand, this Court has recognized that "any deprivation of liberty is a serious matter. . . [and]. . .is different in kind" than other deprivations. *Scott v. Illinois*, 440 U.S. 367, 373 (1979); *see also Addington v. Texas*, 441 U.S. at 428 (erroneous commitment sometimes as undesirable as an erroneous conviction); *Lassiter v. Department of Social Services*, 452 U.S. 18, 25 (1981) (individual interest in personal freedom triggers right to counsel); *Gagnon v. Scarpelli*, 411 U.S. 778, 789, n.12 (1973) (individual facing loss of an absolute

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6 This Court's decision in *Addington v. Texas, supra,* addressed the allocation of the risk of error in the commitment process. 441 U.S. at 423. In *Allen v. Illinois, supra,* this Court assessed the applicability of the privilege against self-incrimination, a right designed to foster an accusatory system of justice and not enhance the reliability of the process at hand. 478 U.S. at 375.

liberty interest differently situated from already-convicted probationer or parolee and is entitled to a higher degree of protection).

On the other hand, this Court has distinguished commitment proceedings from criminal trials as the state seeks to treat those in need instead of punishing them. *See Allen v. Illinois*, 478 U.S. at 372-73. The Second Circuit emphasized this distinction by concluding that civil commitment proceedings are not entirely adverse because the state seeks to provide care to mentally ill individuals. 967 F. 2d at 34. In so holding, the court rejected the relevance to civil commitment proceedings of this Court's recognition that expert testimony from both sides will enable a factfinder to render its most accurate decision. 967 F.2d at 34 (*citing Ake v. Oklahoma*, 470 U.S. at 81).

The failure of the Second Circuit to recognize that the provision of expert assistance will enhance the reliability of the commitment process necessarily impacted upon its analysis of the three-prong *Mathews* test in an additional way. A recognition that expert assistance will increase the reliability of commitment hearings results in a determination that such assistance will further the governmental interest in limiting its costly mental health facilities to cases of genuine need. *Parham v. J.R.*, 442 U.S. 584, 604-05 (1979); *see also* Lipton & Simon, *Psychiatric Diagnosis in a State Hospital: Manhattan State Revisited*, 36 Hosp. & Comm. Psych. 368, 372 (1985) (more accurate psychiatric assessments can result in savings of $40,000 per patient annually).

In sum, the Second Circuit failed to recognize both that the provision of expert testimony will enhance the accuracy of commitment proceeding and a deprivation of liberty triggers procedural protections that ordinarily would

not be required. Such failure, together with the absence of case law from this Court setting forth relevant considerations to apply when assessing the applicability to civil commitment hearings of procedural protections designed to enhance the reliablity of the civil commitment process, resulted in the Second Circuit framing its decision around the principle that "`[i]t cannot be said. . .that it is much better for a mentally ill person to `go free' than for a mentally normal person to be committed.'" 967 F. 2d at 35 (*quoting Addington v. Texas*, 441 U.S. at 429). While such a focus is appropriate when determining how the risk of error should be allocated in a commitment proceeding, *Addington*, 441 U.S. at 423, the Second Circuit should have attempted to ensure that "an erroneous confinement should be avoided in the first instance." *Addington*, 441 U.S. at 428.

The Second Circuit's emphasis on the non-adversarial nature of commitment proceedings also resulted in the court failing to recognize that the State must afford a litigant with an "opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake." *Ake v. Oklahoma*, 470 U.S. at 76. This right to meaningful participation also applies to proceedings that are "quasi-criminal." 470 U.S. 76. There can be little doubt that commitment proceedings are quasi-criminal as the patient faces a loss of liberty as state involvement "undeniably pervade[s]" the proceeding. *Little v. Streater*, 452 U.S. 1, 9 (1981). The failure to address the concept of meaningful participation resulted in the Second Circuit focusing on the reliability of the ultimate decision to confine by incorporating into its due process analysis such factors as the multiple opportunities for patients to obtain release. *See* 967 F. 2d at 35. Such analysis shifts the focus of the due process analysis away from the opportunity to meaningfully

challenge one's confinement to likely accuracy of the initial decision to confine. Under such focus, the greater number of procedural protections the State affords a patient prior to a commitment hearing, the less protections the State must afford him at the hearing. This focus shifts the ultimate responsibility to ensure that there has been no erroneous deprivation of liberty from a legal factfinder to the governmental officials who make the decision to confine in the first instance.[7]

The Second Circuit's failure to recognize the importance of an individual's liberty interest also resulted in the court minimizing the assistance that a psychiatric expert can play in his role as a consultant and elevating possible ethical concerns for the court-appointed witness. 967 F. 2d at 35 ("providing assistance in trial strategy might pose a dilemma for a psychiatrist whose

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7 The Second Circuit's view of the utility of a court-appointed psychiatric expert differs greatly from the other courts and commentators that have examined the issue. As the court found in *In re Gannon*, 301 A. 2d 493 (N.J. Super. 1973), "[n]o matter how brilliant the lawyer may be, he is no position to effectively contest the commitment proceedings because he has no way to rebut the testimony of the psychiatrist from the institution...In a commitment proceeding where the court is in effect bound by the expertise of the psychiatrist, the right to counsel is of little value without a concurrent right to an independent psychiatric examination. 301 A. 2d at 494; *see also In re Williams*, 478 N.E. 2d 867, 869 (Ill. App. 1985) (rights to counsel and hearing will often fail to protect patient unless he is able to secure advice or testimony of own examiner); *Legal Issues in State Mental Health Care: Proposals for Change-Civil Commitment*, 2 Ment. & Phys. Dis. L. Rep. 75, 104 (1977) (rights to counsel and hearing are hollow without resort to examination and testimony from mental health professional); Farrell, *The Right of an Indigent Civil Commitment Defendant to Psychiatric Assistance of His Own Choice at State Expense*, 11 Idaho L. Rev. 141 (1975) (due process requires provision of psychiatric assistance at civil commitment hearings).

professional judgment favored commitment"). Not only does a concern over medical ethics trivialize a patient's interest in liberty, but such concern is unwarranted because as long as an expert provides truthful information, any assistance is ethically permissible. Appelbaum, *In Wake of Ake: The Ethics of Expert Testimony in an Advocate's World*, 15 Bull. Am. Acad. Psychiatry & Law, 15, 24 (1987).

Finally, by limiting even the provision of independent psychiatric testimony to cases in which a court deems it necessary for a reliable assessment of the patient, the Second Circuit placed patients in a tenuous position. Because of the nuances, subtleties, and uncertainties of psychiatric diagnoses, *see Addington v. Texas*, 441 U.S. at 429-30, patients may lack the ability to establish the necessity of an independent psychiatric evaluation for a reliable assessment without the appointment of the medical expert in the first place.

For all these reasons the decision of the Second Circuit raises issues of utmost importance to every mental patient confined against his will. This Court should grant *certiorari* in order to clarify the scope of procedural protections a State must afford an individual who suffers the massive curtailment of liberty that civil commitment entails.

This Case Raises Significant Legal and Practical Questions Regarding the Right to a Prompt Hearing to Challenge One's Involuntary Hospitalization.

I

In its opinion, the Second Circuit recognized that the Constitution requires the provision of an independent psychiatrist when a court determines it is necessary for a reliable assessment of the patient. However, the court permitted the State to delay the hearing from four to six weeks when a court appoints an independent psychiatrist. 41 F. 3d at 803, 804. In so holding, the Second Circuit failed to recognize that when the State deprives an individual of liberty, any pre-hearing deprivation must be as brief as possible and may not be lengthened by delays that are avoidable. *See County of Riverside v. McLaughlin*, 500 U.S. 44, 55 (1991).

When the State incarcerates an individual, it must accommodate competing concerns. On one hand, states have a strong interest in maintaining public safety, *County of Riverside v. McLaughlin*, 550 U.S. at 52, which includes incarcerating mentally ill individuals deemed to pose a danger to themselves or others. *See e.g., O'Connor v. Donaldson*, 422 U.S. 563, 575-76 (1975); *Jones v. United States*, 463 U.S. 354, 368 (1983). On the other hand, prolonged confinement, whether in jail or a psychiatric hospital, for even a brief period of time, has adverse consequences such as imperiling one's job, interrupting one's source of income and impairing one's family relationships. *County of Riverside*, 500 U.S. at 52; *see also Parham v. J.R.*, 442 U.S. at 626 (Brennan, J., concurring in part and dissenting in part).

This Court has never delineated a constitutionally acceptable time frame for a commitment hearing. This has resulted in a problem similar to that which this Court sought to resolve in *County of Riverside*. Just as this Court's admonition that probable cause determinations be "prompt" led to a "flurry of systemic challenges to city and county practices," 500 U.S. at 56, the absence of any case law from this Court setting forth an acceptable time frame for commitment hearings that lower courts could apply has led to federal courts attempting ad hoc to assess what constitutes a "reasonable" period of confinement pending a hearing. These cases have resulted in courts arbitrarily deeming a wide range of time periods constitutionally permissible or setting forth time limitations for the provision of hearings when courts have found State statutes unconstitutional. *See Project Release v. Prevost*, 722 F. 2d 960, 975 (2d Cir. 1983) (hearing within five days without a probable cause determination satisfies due process because of other procedural protections within State commitment statute); *French v. Blackburn*, 428 F. Supp. 1351, 1355 (M.D.N.C. 1977) (three-judge court), *aff'd*, 443 U.S. 901 (1977) (ten day custody prior to full adversary hearing constitutional; no probable cause hearing required); *Coll v. Hyland*, 411 F. Supp. 905, 910-11 (D.N.J. 1976) (three-judge court) (twenty day period of confinement without a hearing constitutional); *Doremus v. Farrell*, 407 F. Supp. 509, 515 (D.Neb. 1975) (three-judge court) (full hearing within fourteen days; prelimimary hearing within five days of admission); *Kendall v. True*, 391 F. Supp. 413, 419 (W.D.Ky. 1975) (three-judge court) (hearing required within twenty-one days of hospitalization; probable cause hearing required earlier); *Lynch v. Baxley*, 386 F. Supp. 378, 388 (M.D.Ala. 1974) (three-judge court) (full hearing within thirty days of confinement; probable cause hearing within seven days of confinement); *Bell v. Wayne County*

General Hospital, 384 F. Supp. 1085, 1098 (E.D.Mich. 1974) (three-judge court) ("prompt" preliminary hearing required; five day limitation on confinement without hearing appears "appropriate"); *Lessard v. Schmidt*, 349 F. Supp. 1078, 1091-92 (E.D.Wisc. 1972) (three-judge court), *vacated and remanded*, 414 U.S. 473, *on remand*, 379 F. Supp.1376 (E.D.Wisc 1974), *vacated and remanded*. 421 U.S. 957, *reinstated*, 413 F. Supp. 1318 (E.D.Wisc .976) (full hearing required within ten to fourteen days of detention; preliminary hearing within forty-eight hours); *Logan v. Arafeh*, 346 F. Supp. 1265, 1268-1269 (1972) (three-judge court), *aff'd. sub nom. Briggs v. Arafeh*, 411 U.S. 911 (1973) (forty-five day confinement without a hearing permissible).[8]

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8 Furthermore, the Court's summary affirmance in *Briggs v. Arafeh* may have inappropriately resulted in at least two three-judge courts placing undue reliance upon the opinion. The courts in both *Coll v. Hyland* and *French v. Blackburn* cited this Court's summary affirmance of *Logan v.Arafeh* and *Hicks v. Miranda*, 422 U.S. 332 (1975), in which this Court held that a summary affirmance is binding precedent, to conclude that this Court has determined that a forty-five day confinement without a hearing is not unreasonable. *See French v. Blackburn*, 428 F. Supp. at 1356; *Coll v. Hyland*, 411 F. Supp. at 910. However, since these lower court opinions, this Court has made clear that a summary affirmance has "considerably less precedential value than an opinion on the merits." *Illinois State Board of Elections v. Socialist Workers Party*, 422 U.S. 173, 180-81 (1979). *See also Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 476-78 n.20 (1979) (summary affirmance "represents no more than a view that the judgment appealed from was correct as to those federal questions raised and necessary to the decision. It does not. . .necessarily reflect our agreement with the opinion of the court whose judgment is appealed"); *Mandel v. Bradley*, 432 U.S. 173, 175 (1977) ("rationale of the affirmance may not be gleaned solely from the opinion below"). Moreover, this Court decided *Briggs* prior to its decisions in *O'Connor v. Donaldson*, *supra*, and *Addington v. Texas*, *supra*, in which this Court first placed

II

Admittedly, the Constitution does not require the State to provide a hearing sooner than is administratively feasible. *See County of Riverside*, 500 U.S. at 253-54; *Lessard v. Schmidt*, 349 F. Supp. at 1092 (full hearing as soon after detention as possible while permitting psychiatrists to conduct examinations and prepare reports and patients to prepare defense); *Developments in the Law - Civil Commitment of the Mentally Ill*, 87 Harv. L. Rev. 1190, 1281 (1974) (hearing as soon as possible while permitting full diagnostic assessment of patient). However, this Court has clearly indicated that the need for "flexibility has its limits." *County of Riverside*, 500 U.S. at 55.

In its opinion, the court below inappropriately trivialized the harm suffered by involuntarily confined mental patients and unnecessarily deferred to administrative concerns of the State. The Second Circuit first concluded that a delay of two to four weeks does not amount to a "massive curtailment of liberty." 41 F. 3d at 804. The Circuit then ignored the fact that other counties within New York conducted hearings within one to two weeks of a psychiatric appointment. *See* 41 F. 3d at 804. Without pointing to factual support in the record, the Circuit attributed the ability of some counties to conduct hearings one to three times more promptly on both the concentration of psychiatrists in the particular counties and their under-utilization by the court systems within each particular county. *See id.*[9] In so holding, the Second

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limitations upon a state's authority to civilly commit mentally ill individuals because of the significant deprivations suffered by a confined mental patient.

9 In relying on local demographics as a basis for its due process

Circuit reached a decision at odds not only with at least the three-judge district courts in *Lessard v. Schmidt*, *Doremus v. Farrell*, and *Kendall v. True*, but also with well-recognized authority that has attempted to balance the competing concerns of individual liberty and the need for the state to provide treatment to those in need. *See* National Center for State Courts, *Guidelines for Involuntary Civil Commitment*, 10 Ment. & Phys. Dis. L. Rep. 409, 480 (1986) (hearing within three days of confinement); Stromberg & Stone, *A Model State Law on Civil Commitment of the Mentally Ill*, 20 Harv. J. Legis. 275, 337 (1983) (hearing within three days for hospitalized individuals).

Ultimately, the Second Circuit permitted the four to six week delays because the patients failed to come forth with practical remedies for the delays. *See* 41 F. 3d at 804. In so holding, the Second Circuit ignored two well-settled principles of consititutional law. First, the Second Circuit ignored the firmly established distinction between a constitutional violation and the remedy needed to correct it. *See e.g., Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15-16 (1971). Indeed, this Court's decision in *County of Riverside* establishes that there is no great difficulty in fashioning equitable relief once a constitutional violation has been found to exist. Second, by forcing patients to choose between a hearing within five

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analysis, the Second Circuit's opinion is reminiscent of arguments raised when this Court addressed the question of the right to counsel in *Gideon v. Wainwright, supra. See Amicus Curiae* Brief for the State of Alabama at 13 ("it is not an uncommon situation in thinly populated rural counties for there to be more persons charged with crime than there are lawyers versed in criminal practice; and some judges may encounter real difficulty in appointing enough qualified lawyers").

days under Mental Hygiene Law § 9.31 and waiting four to six weeks if they seek, and a court appoints, an independent psychiatrist, the Second Circuit permitted the State to compel patients to choose between a prompt hearing and independent psychiatric testimony. However, it is well-settled that the government may not condition the exercise of a right or privilege upon the forfeiture of another right or privilege. *See e.g., Dolan v. City of Tigard*, _ U.S._, _, 114 S. Ct. 2309, 2318 (1994); *Thomas v. Review Board of Indiana Employment Sec.*, 450 U.S. 707, 716-717 (1981).

CONCLUSION

For the reasons set forth in this petition, the petition for *certiorari* should be granted.

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